A

WAN ZUBAIDAH WAN MAHMOOD (AS THE REPRESENTATIVE OF THE ESTATE OF NIK AB RAHMAN NIK MAT, DECEASED) & ANOR v. CIMB BANK BHD

B

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
NALLINI PATHMANATHAN JCA
SURAYA OTHMAN JCA
[CIVIL APPEAL NO: B-02(A)-831-04-2017]
11 JUNE 2018

C

BANKING: *Loan – Loan facility – Property as security for loan – Default in repayment of facilities – Recovery of debt – Enforcement of charge over property – When cause of action accrued – Whether time limit for enforcement of charge expired – Bank commenced order for sale vide issuance of Form 16D – Whether* D *issuance of Form 16D could enable creation of 'cause of action' for purposes of limitation – Whether bank entitled to claim interest on debt due beyond period of six years – Limitation Act 1953, s. 21(1), (5)*

On 20 April 1981, Bank Bumiputra Malaysia Berhad (now CIMB Bank Bhd) offered a fixed loan of RM130,000 to the second defendant/appellant ('the E deceased'), who was also the registered owner of a property ('the property'). As security for the loan, a first fixed charge was registered in favour of the bank on 21 October 1981. Upon the death of the deceased, the first appellant ('first defendant') was appointed the personal representative of his estate. The deceased defaulted in the repayment of facilities in the 1980's, after which F the bank on 8 January 1987 and 17 February 1987 issued the statutory form for the commencement of an order for sale under the National Land Code ('NLC') *vide* the issuance of a Form 16D. On 5 October 1988, an order for sale was granted by the Land Administrator. However, in view of a series of unsuccessful auctions, the Land Administrator issued a certificate of G reference to court and the order for sale proceedings were effectively transferred to the High Court *vide* s. 265(3)(b) of the NLC. On 31 May 2004, the bank issued a Form 16D against the second defendant. Eight years later, on 26 March 2012, the bank filed an originating summons in the High Court at Kuala Lumpur. On 26 April 2013, the High Court Judge granted the bank's request to withdraw the originating summons with liberty to file H afresh but subject to conditions, *inter alia,* that the bank furnish to the defendants computation of accounts showing detailed interests and deposits paid in any public auction held and that was forfeited by the bank. Following this, on 12 December 2014, the bank filed an originating summons in the High Court. On 4 August 2015, the High Court granted an order for sale I under s. 265(3A) of the NLC to substitute the order for sale dated 5 October 1988. However, it was not evident that there was compliance with the 24 April 2013 order ('conditional withdrawal order'). The defendant appealed to this court against this order for sale. On 29 February 2016, the

defendant's appeal was allowed and the decision of the High Court of 4 August 2015 was set aside. The bank went on to file a third application to substitute the Land Administrator's order for sale with an order for sale from the High Court on 2 August 2016 ('the third application for an order for sale'), which comprised the subject matter of the present appeal. On 4 April 2017, the High Court Judge allowed the third application for an order for sale. Hence, the defendant appealed. The defendant maintained that the bank had still failed to comply with the condition of a detailed statement of account. The defendant further disputed the now outstanding sum claimed by the bank which stood at RM634,082.10. The primary issues that arose herein were (i) when does a cause of action accrue for the purposes of s. 21(1) of the Limitation Act 1953 in relation to the recovery of land by the enforcement of a charge; (ii) does a cause of action accrue when the debt first became due and payable or does such right arise upon compliance with the provisions of s. 256 of the National Land Code upon issuance of the Form 16D; and (iii) for what period of time is interest on the debt due recoverable under the provisions of s. 21(5) of the Limitation Act 1953.

Held (allowing appeal)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The High Court Judge erred in law and in fact when accepting the statement of account in KA7 as providing full details and computation as ordered by the High Court and this court. There were no details prior to the period from 1987 (the date of default) to date. To that extent, it remained incomplete. Neither did KA7 disclose the mode of computation of interest in respect of the debt nor was there a full explanation from the bank in relation to deductions in relation to the land office receipts. (para 29)

(2) From the chronology set out at the outset, it was evident that default in the repayment of the facility was sometime in 1987, as this was when the Form 16D was issued in respect of the proposed auction sale under the Land Administrator pursuant to the provisions of the NLC. The date when the right to receive the money accrued must mean the date when the borrower defaulted in his repayment obligations resulting in a recall or termination of the facilities. Herein, this would appear to have occurred in 1987. The subject charge was first sought to be enforced *vide* the issuance of a Form 16D in 1987. Twelve years from 1987 is 1999. As such, the time limit for the enforcement of the charge would have expired by the end of 1999 or before 2000, given that there was no specific date of default specified. (paras 32, 34 & 35)

(3) The issuance of a fresh Form 16D in 2012, after a delay of some eight years, did not denote the date when the right to receive the monies accrued. The issuance of the Form 16D did not, and could not, enable or facilitate the creation of a 'cause of action' for the purposes of limitation. The provisions of the NLC, namely s. 256, affords a chargor-

A debtor an opportunity to remedy the breach before the chargee-bank enforces its right to pursue an order for a judicial sale as statutorily prescribed. As such it could not and ought not to be equated with the date when the bank's right to receive the money accrued. (paras 41 & 44)

B **(4)** The bank's application for a judicial sale under s. 256 of the NLC was caught by limitation under the provisions of s. 21(1) of the Limitation Act 1953. As such, the bank was unable to enforce its charge in view of the fact that more than 12 years have accrued since the date when the default in the repayment of the debt arose in 1987. The relevant date was C the date of default in repayment and not the date of issuance of the Form 16D. (para 46)

(5) An application of s. 21(5) provides that no recovery of arrears of interest was payable in respect of a sum of money secured by a charge may be brought after the expiry of six years from the date when that interest D became due. Thus, the provisos in subsection (a) and (b) were not applicable in the instant case. It therefore followed that no arrears of interest was recoverable for a period of six years from 1987. The bank's claim for interest over a period of almost 30 years ran awry of and contravened the provisions of s. 21(5). (paras 51-53)

E **(6)** The bank was not entitled to do an order for sale as sought *vide* the originating summons filed. The judge had erred in granting the prayers sought. On the contrary, the debtor had more than sufficiently established cause to the contrary as provided under the NLC. Hence, the order of the High Court was set aside. (paras 54 & 55)

F ***Bahasa Malaysia*** *Headnotes*

Pada 20 April 1981, Bank Bumiputra Malaysia Berhad ('kini dikenali sebagai CIMB Bank Bhd') menawarkan kemudahan pinjaman tetap RM130,000 pada defendan/perayu kedua ('si mati') yang juga pemilik berdaftar hartanah G ('hartanah.') Sebagai jaminan pinjaman tersebut, gadaian tetap pertama telah didaftarkan memihak bank pada 21 Oktober 1981. Setelah kematian si mati, perayu pertama ('defendan pertama') dilantik sebagai wakil estetnya. Si mati gagal membayar pembayaran balik kemudahan pada tahun 1980-an, dan selepas itu bank pada 8 Januari 1987 dan 17 Februari 1987 H mengeluarkan borang berkanun untuk memulakan perintah jualan bawah Kanun Tanah Negara ('KTN') melalui pengeluaran Borang 16D. Pada 5 Oktober 1988, satu perintah jualan diberikan oleh Pentadbir Tanah. Tetapi, memandangkan berlakunya beberapa lelongan yang tidak berjaya, Pentadbir Tanah mengeluarkan sijil rujukan ke mahkamah dan prosiding I perintah jualan dipindah milik ke Mahkamah Tinggi melalui s. 265(3)(b) KTN. Pada 31 Mei 2004, bank mengeluarkan Borang 16D terhadap defendan kedua. Lapan tahun kemudian, pada 26 Mac 2012, bank memfailkan saman pemula di Mahkamah Tinggi Kuala Lumpur. Pada 26 April 2013, Mahkamah Tinggi membenarkan permintaan bank untuk

menarik balik saman pemula dengan kebebasan untuk memfailkan semula tetapi tertakluk pada beberapa syarat, antara lain, bahawa bank memberi kepada defendan-defendan pengiraan akaun yang menunjukkan butir-butir faedah-faedah dan deposit-deposit yang dibayarkan di mana-mana lelongan awam yang dilaksanakan dan dirampas oleh bank. Berikutan ini, pada 12 Disember 2014, bank memfailkan saman pemula di Mahkamah Tinggi. Pada 4 Ogos 2015, Mahkamah Tinggi membenarkan perintah jualan bawah s. 265(3A) KTN untuk menggantikan perintah jualan bertarikh 5 Oktober 1988. Walau bagaimanapun, tiada bukti bahawa terdapat pematuhan perintah 24 April 2013 ('perintah pengeluaran bersyarat'). Defendan merayu ke mahkamah ini terhadap perintah jualan. Pada 29 Februari 2016, rayuan defendan dibenarkan dan keputusan Mahkamah Tinggi pada 4 Ogos 2015 diketepikan. Bank seterusnya memfailkan permohonan ketiga untuk menggantikan perintah jualan Pentadbir Tanah dengan perintah jualan oleh Mahkamah Tinggi pada 2 Ogos 2016 ('permohonan ketiga untuk perintah jualan'), yang meliputi subjek perkara rayuan ini. Pada 4 April 2017, Hakim Mahkamah Tinggi membenarkan permohonan ketiga untuk perintah jualan. Oleh itu, defendan merayu. Defendan mengekalkan bahawa bank masih gagal mematuhi syarat penyataan akaun yang terperinci. Defendan juga mempertikaikan jumlah yang tertunggak kini yang dituntut oleh bank yang amaunnya adalah RM634,082.10. Isu-isu yang timbul adalah (i) bilakah kausa tindakan terakru dalam maksud s. 21(1) Akta Had Masa 1953 berhubungan pemulihan tanah melalui penguatkuasaan gadaian; (ii) adakah kausa tindakan terakru apabila hutang pertama kali perlu dibayar atau adakah hak sebegitu timbul menurut peruntukan-peruntukan s. 256 KTN atas pengeluaran Borang 16D; dan (iii) untuk berapa tempoh masa faedah atas hutang boleh diperoleh semula bawah peruntukan-peruntukan s. 21(5) Akta Had Masa 1953.

Diputuskan (membenarkan rayuan)

Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila menerima penyata akaun KA7 sebagai telah memberikan butir-butir dan pengiraan penuh seperti yang diperintahkah oleh Mahkamah Tinggi dan mahkamah ini. Tiada butir-butir sebelum 1987 (tarikh kemungkiran) sehingga kini. Setakat itu, butir-butir ini tidak lengkap. KA7 tidak mendedahkan cara pengiraan faedah berhubungan hutang. Tiada juga penjelasan daripada bank berhubungan potongan berkaitan dengan resit-resit pejabat tanah.

(2) Berdasarkan kronologi yang dibentangkan, jelas bahawa keingkaran dalam pembayaran balik kemudahan adalah pada tahun 1987, kerana masa ini Borang 16D telah dikeluarkan berhubungan lelongan jualan yang dicadangkan bawah Pentadbir Tanah menurut peruntukan-peruntukan KTN. Tarikh apabila hak untuk menerima wang terakru harus bermaksud tarikh peminjam gagal memenuhi obligasi bayaran

yang mengakibatkan kemudahan dibatalkan. Di sini, ini berlaku pada 1987. Subjek gadaian pertama kali dituntut untuk dikuatkuasakan melalui pengeluaran Borang 16D pada 1987. Dari 1987 hingga 1999 adalah 12 tahun. Oleh itu, had masa untuk penguatkuasaan gadaian luput akhir 1999 atau sebelum 2000, memandangkan tiada tarikh spesifik pengingkaran ditentukan.

(3) Pengeluaran Borang 16D baharu pada 2012, selepas kelengahan lapan tahun, tidak menunjukkan tarikh apabila hak untuk menerima wang terakru. Pengeluaran Borang 16D tidak boleh memudahkan kewujudan 'kausa tindakan' untuk tujuan had masa. Peruntukan-peruntukan KTN, iaitu s. 256, memperuntukkan penghutang-penggadai untuk meremedikan pelanggaran sebelum pemegang gadaian-bank menguatkuasakan haknya untuk meneruskan satu perintah jualan kehakiman seperti yang digambarkan secara berkanun. Oleh itu, ia tidak patut disamakan dengan tarikh apabila hak bank untuk menerima wang terakru.

(4) Permohonan bank untuk jualan kehakiman bawah s. 256 KTN dilarang oleh had masa bawah peruntukan-peruntukan s. 21(1) Akta Had Masa 1953. Dengan itu, bank tidak dapat menguatkuasakan gadaiannya memandangkan fakta bahawa lebih daripada 12 tahun terakru sejak tarikh apabila berlaku keingkaran dalam pembayaran balik hutang timbul pada 1987. Tarikh yang relevan adalah tarikh berlakunya keingkaran pembayaran balik dan bukan tarikh pengeluaran Borang 16D.

(5) Permohonan s. 21(5) memperuntukkan bahawa tiada pemerolehan tunggakan faedah boleh dibayar berkenaan satu jumlah wang yang dijaminkan oleh gadaian boleh dibawa selepas pelupusan enam tahun dari tarikh apabila faedah menjadi dijangka. Oleh itu, proviso-proviso dalam sub-s. (a) dan (b) tidak diguna pakai dalam kes ini. Dengan itu diikuti bahawa tiada tunggakan kepentingan boleh diperoleh untuk tempoh enam tahun dari 1987. Tuntutan bank untuk faedah bagi tempoh hampir 30 tahun adalah salah dan melanggar peruntukan-peruntukan s. 21(5).

(6) Bank tidak berhak melaksanakan perintah jualan seperti yang dituntut melalui saman pemula yang difailkan. Hakim terkhilaf apabila membenarkan tuntutan-tuntutan yang dituntut. Sebaliknya, penghutang telah secara memadai membuktikan sebab bertentangan seperti yang diperuntukkan bawah KTN. Oleh itu, perintah Mahkamah Tinggi diketepikan.

Case(s) referred to:
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Sivadevi Sivalingam v. CIMB Bank Bhd [2018] 1 LNS 511 CA ***(foll)***
Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 21(1), (5)
National Land Code, ss. 256, 265(3)(b), (3A)

For the appellant - Suria Kumar; M/s Suria Kumar & Co
For the respondent - Ahmad Zamri & Ooi Hean Ping; M/s Che Mokhtar & Ling

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: BA-24FC-1096-08-2016 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] This appeal has a chequered history. It relates to the recovery of a debt arising from the grant of a loan facility to one Nik Ab Rahman bin Nik Mat, now deceased as early as 1981. There was default in the repayment of the loan and enforcement of the charge over landed property, namely a house, comprising security for the loan was initiated in 1987. The primary issues in this appeal relate to limitation and the construction to be afforded to ss. 21(1) and (5) of the Limitation Act 1953, in the context of s. 256 of the National Land Code. When does a cause of action accrue for the purposes of s. 21(1) of the Limitation Act 1953 in relation to the recovery of land by the enforcement of a charge? Is it when the debt first became due and payable or does such right arise upon compliance with the provisions of s. 256 of the National Land Code upon issuance of the Form 16D?

[2] In determining this issue we are guided by the decision of this court in *Sivadevi Sivalingam v. CIMB Bank Bhd* [2018] 1 LNS 511).

Factual Matrix

[3] On 20 April 1981, Bank Bumiputra Malaysia Berhad ('BBMB') offered a fixed loan facility of RM130,000 to one Nik Ab Rahman bin Nik Mat, now deceased ('the deceased'). The deceased was also the registered owner of a property held under H.S.(M) 124, Lot No. 7663, Mukim Sg. Buloh, Daerah Petaling, Selangor Darul Ehsan. As security for the loan, a first fixed charge was registered in favour of BBMB on 21 October 1981.

[4] The deceased was the second defendant throughout most of these proceedings, but upon his death, the first defendant, Wan Zubaidah bt Wan Mahmood was appointed the personal representative of his estate.

[5] On 3 September 1999 the business and assets of BBMB were transferred to and vested in the Bank of Commerce (M) Bhd. On 30 September 1999, the latter bank changed its name to Bumiputra-Commerce Bank Berhad.

[6] On 6 September 2006, *vide* a second vesting order, Southern Bank Berhad and Bumiputra-Commerce Bank Berhad's business and assets were transferred and vested in Bumiputra-Commerce Bank Berhad. Bumiputra-Commerce Bank Berhad then changed its name to CIMB Bank Berhad.

[7] The plaintiff, who is the respondent here, is therefore CIMB Bank by reason of the devolving of the business and assets of BBMB and Bumiputra-Commerce Bank as well as Southern Bank to it *vide* the two vesting orders ('the bank').

[8] The deceased defaulted in the repayment of facilities in the 1980's, after which the bank on 8 January 1987 and 17 February 1987 issued the statutory form for the commencement of an order for sale under the National Land Code ('NLC') *vide* the issuance of a Form 16D.

[9] On 5 October 1988, an order for sale was granted by the Land Administrator of the Petaling Land Office, after which a first auction was fixed for the 31 October 1988 for RM100,000. A sale was effected at the price of RM119,000 but the purchaser failed to pay the balance purchase price, after which the sale was cancelled by the Land Administrator.

[10] A second and third auction on 23 December 1993 and 8 September 1994 were fixed with reserve prices of RM156,000 and RM153,000 respectively. The land remained unsold.

[11] On 13 June 2003, deposits previously paid by successful bidders amounting to RM36,538 was forfeited and credited to the account of the borrower.

[12] In view of the unsuccessful auctions, the Land Administrator issued a "Certificate of Reference to Court" or "Sijil Rujukan Mahkamah". The order for sale proceedings were effectively transferred to the High Court *vide* s. 265(3)(b) of the NLC.

[13] On 31 May 2004, the bank issued a Form 16D against the second defendant. Some eight years later on 26 March 2012, the bank filed an originating summons in the High Court at Kuala Lumpur. The originating summons was amended to include the first defendant as the personal representative of the estate. During the hearing of this originating summons the bank sought to withdraw its application with liberty to file afresh since it had failed to produce any statement of account.

[14] On 26 April 2013, the learned High Court Judge granted the bank's request to withdraw the originating summons with liberty to file afresh but subject to the following conditions. These conditions are of importance because they are relevant to the subsequent appeals that arose. The conditions that were imposed and which the bank was obliged to comply with are, *inter alia* as follows:

> (i) The Defendants are allowed to raise factual and legal issues raised in the Plaintiff's application herein in any other subsequent applications to be filed by the Plaintiff;
>
> (ii) The Plaintiff furnishes to the Defendants computation of accounts showing detailed interest and deposits paid in any public auction held and that was forfeited by the Plaintiff;

(iii) Defendant is at liberty to raise any objections in respect of the procedure relating to the reference made by the Pentadbir Tanah to the High Court;

(iv) Costs in the sum of RM5,000-00 to be paid by the Plaintiff prior to refilling their application.

[15] It is pertinent that in their written submissions, learned counsel omits to mention this salient matter, namely that the withdrawal with liberty to file afresh was subject to these conditions. Instead, counsel merely states that the originating summons was withdrawn with liberty to file afresh because "the property was not within the jurisdiction of the court". This amounted to an omission of a crucial set of facts. Counsel should always set out all material facts whether in their favour or otherwise. If not, this may well amount to misleading the court.

[16] Following this, on 12 December 2014 the bank filed an originating summons in the High Court at Shah Alam. On 4 August 2015 the High Court granted an order for sale under s. 265(3A) of the NLC to substitute the order for sale dated 5 October 1988 granted by the Land Administrator. However it is not evident that there was compliance with the order of 24 April 2013 ('the conditional withdrawal order'). It was not clear that the bank produced a statement of account displaying details of the amount outstanding, the computation of interest and that credit had been fully accorded to the defendant's debt for deposits that had been forfeited by the bank in respect of failed auctions.

[17] The defendant appealed to this court against this order for sale. On 29 February 2016, the defendant's appeal was allowed and the decision of the High Court of 4 August 2015 was set aside. In allowing the defendant's appeal this court made the following orders:

(i) Rayuan Perayu-Perayu di benarkan dengan kos RM10,000 di sini dan di Mahkamah Tinggi Kuala Lumpur Saman Pemula No: 24NCVC-785-03/2012 di bayar kepada Perayu-Perayu oleh Responden;

(ii) Perintah mahkamah Tinggi Shah Alam, ... bertarikh 4.08.2015 di ketepikan;

(iii) Responden di berikan kebebasan untuk memfailkan semula Saman Pemula yang serupa dengan *syarat mematuhi terlebih dahulu Perintah Mahkamah Tinggi Kuala Lumpur, Saman Pemula No. 24NCVC-785-03/2012 bertarikh 26 April 2013 iaitu Responden untuk memaklumkan kepada Perayu Terhadap kiraan yang di kemukakan bersama faedah secara terperinci dengan mencatatkan sebarang deposit yang di bayar dalam sebarang lelongan awam yang* di adakan yang mana telah di rampas oleh Responden; …

[18] This court in effect reiterated that it was incumbent upon the bank to comply with the conditions set out in the conditional withdrawal order of 24 April 2013 issued by the High Court. The primary condition of relevance here is the computation of the current sum stated to be outstanding by the bank particularly in relation to:

(a) Computation of interest element; and

(b) Crediting of forfeited deposits from failed auctions to the defendant's account.

[19] The bank through its solicitors sent a copy of such statement of account as it had on 1 July 2016. It then went on to file a third application to substitute the Land Administrator's order for sale with an order for sale from the High Court on 2 August 2016 ('the third application for an order for sale'). It is this third application which comprises the subject matter of the present appeal.

[20] On 4 April 2017, the same judge who had heard the second order for sale application by the bank, allowed the third application for an order for sale.

[21] The defendant maintained that the bank had still failed to comply with the condition of a detailed statement of account. This because, the defendant alleges:

(a) The bank produced a five-page statement commencing from May 2000, when in fact the defendant had an account with the bank from October 1981. Therefore the statement of account was incomplete as no accounts prior to May 2000 had been produced;

(b) The computation of interest on the fixed loan was supposed to be on a yearly rest basis while the statement of account shows that the computation of interest is on a monthly or daily rest basis;

(c) The bank had failed to take into account several deposit payments between 1988 and 1994 amounting in total to RM60,950 and credit these sums to the defendant's account;

[22] For these reasons, the defendant disputes the now outstanding sum claimed by the bank which stands at RM634,082.10. The defendant maintains that the foregoing matters are sufficient to amount to cause to the contrary precluding the grant of an order for sale.

[23] Additionally the defendant maintained that the bank was estopped from claiming interest accruing after a period of six years from the date of default pursuant to s. 21(5) of the Limitation Act 1953.

[24] Further, the defendant maintained that the bank could not obtain an order for sale in respect of the subject property as it was barred by limitation under the provisions of s. 21(1) of the Limitation Act 1953 from commencing such proceedings.

The Decision Of The High Court

[25] The learned High Court Judge in determining the third application for an order for sale, which is the subject matter of this appeal, undertook a detailed analysis of the entire matter. In respect of the statement of accounts, the learned judge produced the five-page statement and undertook an analysis

of the account over the period from 2000 to date. She found that the quantum of the debt brought forward as of June 2000 reflected the amount brought forward from the old account. The interest she concluded was correctly stated to be 10%. Her Ladyship concluded that as of 28 June 2016, the relevant date, the arrears of RM634,082.10 was correctly stated. As such she concluded that the statement of accounts contained the relevant particulars and complied with the order of the High Court and the Court of Appeal.

[26] The second issue in relation to whether the relevant deposits from failed auctions were taken into account, the learned judge undertook a detailed analysis that went outside of the scope of the submissions and issues raised by the parties. The defendant produced land office receipts that were not, it was maintained, taken into account in determining the debt due and owing. The plaintiff did not object to the genuineness of these receipts. However the learned judge concluded from her analysis that these receipts were not genuine. In so doing, she erred in law in taking it upon herself to ascertain and rule on matters not raised by either of the parties. This, to our minds, amounted to a misdirection.

[27] With respect to the other matters raised by the defendant to substantiate 'cause to the contrary' the learned judge concluded that these matters could not be raised because they had been considered by this court in the course of appeal, and therefore amounted to *res judicata*.

[28] In so concluding, the learned judge erred in law as the defendant's right to raise other legal and factual matters to establish cause to the contrary was specifically preserved by the order of the High Court dated 26 April 2013. This in turn was specifically preserved by this court in its order of 29 February 2016. These matters were not specifically determined conclusively by this court. They remain open for consideration at this juncture *albeit* by the court below or this court.

Our Analysis

[29] We have considered the decision of the learned High Court Judge and would concur with learned counsel for the appellant that Her Ladyship erred in fact and law when:

(a) The statement of account in KA7 was accepted as providing full details and computation as ordered by the High Court and this court. It is apparent that there are no details prior to the period from 1987 (the date of default) to date. It may well be that there is no access to these details in view of the transfer of this debt *vide* two vesting orders. However, this has not been explained at all by the bank. To that extent, it remains incomplete;

(b) Neither does KA7 disclose the mode of computation of interest in respect of the debt. It has been stated by the bank that interest was capitalised and thus became a part of the capital sum. While this may indeed be accurate it is not immediately apparent from a scrutiny of KA7;

(c) Neither is there a full explanation from the bank in relation to deductions in relation to the land office receipts. The analysis undertaken by the learned judge of her own accord ought not to be taken into account as it was not raised by the bank. Such conclusions moreover cannot be made out on the basis of affidavit evidence;

(d) The most significant issues which arose for consideration in the course of the appeal was whether the recovery of land by way of an order for sale was in fact available to the bank after the expiry of 12 years pursuant to s. 21(1) of the Limitation Act 1953;

(e) In like vein, it is unclear whether the bank is entitled to claim interest beyond a period of six years in view of the express provisions of s. 21(5) of the Limitation Act 1953.

[30] In point of fact, the latter two issues ultimately comprised the main issues in contention before us during the appeal. We requested counsel for both parties to submit further submissions in relation to issues (d) and (e) above.

Issue (d): Whether Proceedings For The Recovery Of Land By Way Of An Order For Sale Are Available To The Bank After The Expiry Of 12 Years Pursuant To s. 21(1) Of The Limitation Act 1953?

[31] Section 21(1) provides in essence that proceedings for the recovery or enforcement of security by way of a charge over land carries a limitation period of 12 years. It provides as follows:

> **21 Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land**
>
> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

[32] In the instant case, it is evident from the chronology set out at the outset that default in the repayment of the facility was sometime in 1987, as this was when the Form 16D was issued in respect of the proposed auction sale under the Land Administrator pursuant to the provisions of the NLC.

[33] Section 21(1) envisages that:

(i) any action to recover the principal sum secured by a charge is to be initiated within 12 years from the date when the right to receive the money accrued;

(ii) the enforcement of a charge on land is not to be effected after the expiration of 12 years from the date when the right to receive the money accrued;

[34] The date when the right to receive the money accrued must mean the date when the borrower defaulted in his repayment obligations resulting in a recall or termination of the facilities. In the instant case, this would appear to have occurred in 1987.

[35] In the instant case, the subject charge was first sought to be enforced *vide* the issuance of a Form 16D in 1987. Twelve years from 1987 is 1999. As such the time limit for the enforcement of the charge would have expired by the end of 1999 or before 2000, given that there is no specific date of default specified.

[36] It might be argued by the bank that the correct date from which to compute the limitation period is the date when the Form 16D was issued in respect of the commencement of proceedings under s. 256 of the NLC, after the issuance of the "Sijil Rujukan Mahkamah" by the Land Administrator on 4 May 2004. However, it has to be borne in mind that the substitution of the proceedings pursuant to s. 265(3)(b) of the NLC to order for sale proceedings in the High Court pursuant to s. 256 does not amount to the accrual of a cause of action as is envisaged in computing when time begins to run for the purposes of limitation.

[37] This is because in accordance with well-accepted authorities on the computation of the limitation period (see *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32 and *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207), time begins to run from the date when "… the right to receive the money accrued" pursuant to s. 21(1) of the Limitation Act 1953.

[38] In *Nasri v. Mesah*, the Federal Court held that "a cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought." It went on to hold that: "the right of action accrues" means one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run."

[39] In the instant case, it is undisputable that the right to receive the debt from the second defendant accrued as early as 1987 when the second defendant as borrower defaulted on repayments in respect of the loan facility.

[40] It was in that context that the first Form 16D was issued so as to enable the bank as chargee to commence proceedings under s. 265(3) given that the sale of the subject land was to be dealt with by the Land Administrator.

[41] As such, the issuance of a fresh Form 16D in 2012, after a delay of some eight years does not denote the date when the right to receive the monies accrued. In other words, the issuance of the Form 16D does not and cannot enable or facilitate the creation of a "cause of action" for the purposes of limitation.

[42] As stated by this court in *Sivadevi Sivalingam v. CIMB Bank Berhad* [2018] 1 LNS 511 in relation to the purpose of the Form 16D (see para. [58] of the judgment, mid-way):

> … The notice is intended to first indirectly remind the chargor of his obligations by pointing out the specific breach; telling the chargor to remedy the breach within the time period specified in the notice; before finally warning the chargor that if the notice is not complied with, proceedings to obtain an order for sale will be sought. Where the chargor does not heed the requirements in the notice the chargee is then entitled to apply for an order for sale under section 256.
>
> The above sets out the mechanism or the process that must be followed before the chargor may apply to the Court for an order for sale of the charged property. But, insofar as how long has the chargor got before the chargor may get round to enforcing that right to seek an order for sale is concerned, the provisions of the Limitation Act 1953 will have to be considered. According to the decisions in *Peh Lai Huat v. MBF Finance Bhd* and *Jigarlal K Doshi @ Jigarlal a/l Kantilal v. Resolution Alliance Sdn Bhd & Anor*, section 21(2) operates only from when the chargor fails to remedy the default or breach as specified in the Form 16D notice.

[43] This court in *Sivadevi*'s case when on to consider in detail the interplay between the contractual rights of recovery of a debt under the charge documentation ie, the substantive contractual rights of the parties versus the provisions of the NLC (see paras [60]-[76] of the judgment). It concluded:

> … Sections 254 to 256 (of the NLC) provide for the procedure, method, mechanism, manner or means of enforcing the right for an order of sale. However, the substantive right of the chargee to approach the Court for the remedy of an order for sale of the charged land is still dependent on there being a breach of the express or implied agreements. The express agreements are to be found in the charge documents while the implied agreements are as provided under section 249 of the National Land Code.
>
> As expounded by the Federal Court in *S & M Jewellery Trading Sdn Bhd v. Fui Lian-Kwong Hing Sdn Bhd*, the right to pursue the statutory remedy of sale is triggered by the event of breach or default in the underlying contractual agreement and in the terms of the charge …

[44] This court concluded that the provisions of the NLC, namely s. 256, affords a chargor-debtor an opportunity to remedy the breach before the chargee-bank enforces its right to pursue an order for a judicial sale as statutorily prescribed. As such, it cannot or ought not to be equated with the date when the bank's right to receive the money accrued. In short, the date when the debt first arose for the purposes of computation of a limitation period and the date when the bank affords the chargor-debtor notice that if he does not remedy the breach, the bank is going to proceed to enforce its rights by way of judicial sale are two different dates that serve different purposes. The latter is procedural or adjectival, while the former marks the trigger of a substantive contractual right to receive a debt.

[45] More significantly, the latter (ie, the issuance of a Form 16D under s. 256 of the NLC) cannot be utilised interchangeably with the first (ie, the date when the bank gives notice to the debtor of a fundamental breach namely default in the repayment of the debt entitling the bank to recall the entire loan and terminate the loan facility) so as to conclude that time starts to run from the date when the Form 16D was issued for the purposes of computation of the limitation period, as extensively and comprehensively explained by this court in *Sivadevi*'s case as well as *Lim Ban Hooi & Anor v. Malayan Banking Bhd* [2018] 6 CLJ 545.

[46] For these reasons, we are of the considered view that the bank's application for a judicial sale under s. 256 of the NLC is caught by limitation under the provisions of s. 21(1) of the Limitation Act 1953. As such, the bank is unable to enforce its charge in view of the fact that more than 12 years have accrued since the date when the default in the repayment of the debt arose in 1987. It is to be noted that the relevant date is the date of default in repayment and not the date of issuance of the Form 16D.

[47] In so concluding, we followed and adopted the reasoning in *Sivadevi*'s case, which, with respect, we concur. It is of considerable importance that the adjectival provision in s. 256 of the NLC is not utilised to circumvent the substantive legal provisions of the Limitation Act 1953. It bears repetition that s. 256 of the National Land Code serves the specific purpose of providing notice of the chargee's intention to initiate a judicial sale of the charged land to the debtor. It therefore affords the debtor an opportunity to remedy his failure to repay the debt. It does not amount to the actual enforcement of the creditor's substantive legal right. That will only ensue upon the pronouncement and effecting of an order for sale judicially.

[48] By contrast, the provisions of the Limitation Act 1953 in s. 21 prescribe substantive legal rights because it provides that the creditor or chargee cannot pursue any right created by a charge over land after the expiry of a period of 12 years. To that extent, it statutorily brings to an end the substantive rights of the chargee to recovery of its debt by way of a judicial sale after a period of 12 years from when the debt first became due. This affords finality and certainty to commercial banking law. That right cannot easily be displaced. It ought not to be displaced simply because a creditor chooses to issue a form indicating that it is about to enforce its rights, if such notice comes well after the period statutorily prescribed by Parliament under the Limitation Act 1953, this would amount, in effect, to a circumvention of s. 21. That ought not to be countenanced. To do so would be to give a creditor a free rein as to when it chooses to enforce its rights as chargee. This could theoretically ensue for an indeterminate period. Apart from contravening the express provisions of the Limitation Act 1953, it would cause undue prejudice and hardship to the debtor, who would be burdened with a far-increased sum than that envisaged by the initial loan in view of

A the levy of interest. And that is precisely the case here, where the initial debt was in the region of RM180,000 and now stands at no less than RM643,000 odd, some 30 years later.

[49] This brings us to the issue of the levy of interest over this period.

B *For What Period Of Time Is Interest On The Debt Due Recoverable Under The Provisions Of s. 21(5) Of The Limitation Act 1953?*

[50] This question may well be academic given our conclusion above, namely that the entire debt is time barred under s. 21(1) of the Limitation Act 1953.

C **[51]** However, an application of s. 21(5) (see *supra*) provides that no recovery of arrears of interest payable in respect of a sum of money secured by a charge may be brought after the expiry of six years from the date when then interest became due. The provisos in sub-s. (a) and (b) are not applicable in the instant case.

D **[52]** It would therefore follow that no arrears of interest is recoverable for a period of six years from 1987, which is the date we have identified as that when the cause of action accrued, or when the debt was first due and repayable to the bank. It is the relevant date for the purposes of computation of the limitation period.

E **[53]** It is therefore immediately apparent that the bank's claim for interest over a period of almost 30 years, more so compounded interest at rates that are not immediately discernible from the statement of account produced, runs awry of and contravenes the provisions of s. 21(5).

F **[54]** For this reason too, we are again not convinced that the bank is entitled to an order for sale as sought *vide* the originating summons filed. We are of the unanimous view that the learned judge erred in granting the prayers sought, for the reasons set out above. On the contrary, it would appear that the debtor has more than sufficiently established cause to the contrary as G provided under the NLC.

[55] As such, the appeal is allowed and the order of the High Court is set aside. Costs are awarded to the appellant in the sum of RM8,000 subject to allocatur. The deposit is refunded.

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